



Précis Paper

Family Law and Property

A discussion of property ownership after separation and divorce, the implications of trusts, loan agreements and inheritances and how to best protect property from ex-spouses.

Discussion Includes

- **The Succession Act and ex-spouses**
- Estate Planning
- Trusts
- **Difference between an asset and a financial resource**
- Inheritances
- Loans

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Family Law and Property

In this edition of BenchTV, Malcolm Gittoes-Caesar (Principal/Director, Head of Family Law, Coleman Greig, Parramatta) and Karina Ralston (Principal Lawyer, Team Leader, Family Law, Coleman Greig, Parramatta) discuss property ownership after separation and divorce, the implications of trusts, loan agreements and inheritances and how to best protect property from ex-spouses.

The Succession Act and ex-spouses

1. An ex-spouse is potentially an eligible person pursuant to the *Succession Act 2006* (NSW) such that they can make a claim against an estate.
2. A Deed of Release can be included when finalising consent orders or incorporated as part of a Binding Financial Agreement, which articulates that both parties are independently provided for by the consent orders or binding financial agreement and will not make a claim against each other's estates.
3. Pursuant to section 95 of the *Succession Act 2009* (NSW) for a deed of release to be binding, it requires a formal release from the Supreme Court. Once it is approved, it will then be enforceable and has the capacity to prevent the ex-spouse from making a claim against the estate.
4. Simply signing the Deed of Release is good evidence of intention, however it is not actually binding.

Estate Planning

5. If a client has separated and completed a property settlement with their ex-spouse but are not divorced and has not changed their will or does not have a will, there is a risk of the assets that the client keeps going to the ex-spouse.
6. If two persons continue to maintain a property as joint tenants, survivorship goes to the surviving spouse. People also tend to not turn their mind to their superannuation and what their binding death nomination is and it may continue to be an ex-spouse.
7. Lawyers need to assist clients with their estate planning requirements or refer them to someone who can as whilst a person may be catered for in the property settlement, it only addresses their need at that moment in time, not what they may need in the future.

Trusts

8. One of the two primary considerations, having regard to *Stanford v Stanford* [2012] HCA 52
Is whether we need to alter legal or equitable rights and consider what the asset pool is.
Trusts are a relevant consideration to either of these issues.
9. An interest in a trust is capable of being included in the asset pool. It is possible that legal or equitable title can be changed in the trust and as a result, that you can be compelled to do something with the asset in the trust irrespective of the fact that it is held in trust.
10. Even if the trust is not taken into account as an asset, it can be taken into account as a resource.
11. If a client receives any form of income from a trust, if they are an appointer of a trust or in any way makes decisions regarding a trust, if they are listed on a trust deed as being a potential beneficiary even if they have not received an income, it is necessary to disclose it.

Difference between an asset and a financial resource

12. An asset is something that is available for division. It is something that goes into the asset pool and will be divided in a particular way.
13. A financial resource is something that the court can take into account when working out how the assets of the relationship are to be divided. Financial resources have a material impact upon the way in which assets are divided, they are just not divisible themselves.
14. For a trust to be considered an asset and included in the balance sheet and thus divisible, there must be an element of one of the parties controlling it, as per the case of *Kennon v Spry; Spry v Kennon* (2008) HSA 56.
15. Section 106B of the *Family Law Act 1975* (Cth), s106B dictates that if a party makes a transaction to defeat the claim of an ex-spouse, the transaction will be reversed.
16. Generally, in a family trust whereby the client is one of the beneficiaries, it will be necessary to look at a history of distributions. If a discretionary beneficiary has never received a distribution, then it will be a difficult argument to mount that it will be a financial resource since there is no history or no evidence of something happening in the future.
17. Under section 75(2) of the *Family Law Act 1975* (Cth), the Court has wide reaching powers in terms of its third party provisions, it can do any act or thing including compelling a party to make distributions to themselves that then make it available for division as an asset.

Inheritances

18. Recent case law is such that assets such as inheritances are unlikely to be quarantined these days, at least for longer relationships.
19. Courts have discretionary jurisdiction. For a short relationship, such as 5 years or less, the court can adopt an asset by asset approach but for longer relationships courts seem much more reluctant to quarantine assets, even assets that were accumulated post separation.
20. There are more arguments made now that as parents are increasingly requiring more care and often moving in with parties, that an ex-spouse contributes to the inheritance in some way. In the past, this was typically only the case for farming properties or family businesses.
21. There are a number of things can look at when determining whether an inheritance is going to be an asset or a financial resource such as when the inheritance came in, any contributions made by the parties to the inheritance, how big the inheritance is vis a vie how big the asset pool is and if the inheritance was received during the course of the relationship, the court will look at how it was applied. The court will look at future needs as it must under section 75(2) of the *Family Law Act 1975* (Cth) and also what is just and equitable.
22. To protect inheritances, it is essential for parties to document how much the inheritance was, when it was received and where it went. It is also important to get divorced and complete the property settlement as soon as possible to avoid the risk of assets coming into the asset pool post separation. It is also a good idea to do a binding financial agreement to deal with the issue of inheritance as separate property.
23. A court can delay proceedings until Probate is granted and an inheritance made as the will and probate application have to be disclosed as the rules provide for any asset that you have an interest in. Ultimately the court must make orders that are just and equitable and they have a wide range of powers to ensure that is the case

Loans

24. Monies advanced by parents for the purchase of a property require the loan to be documented and will recognize the advancement of money if it is payable on demand, there are interest rates and a history of repayments. For a loan, there should be a loan agreement, a registered mortgage, terms for repayment and actual repayment.
25. The limitation act is clear, a loan that is simply repayable on demand only has a limitation period of 6 years and often is the case that this has well and truly expired when parties separate

BIOGRAPHY

Malcolm Gittoes-Caesar

Principal/Director, Head of Family Law, Coleman Greig - Parramatta

Malcolm Gittoes-Caesar currently heads Coleman Greig's Family Law Team and is both an Accredited Family Law Mediator and Arbitrator. With over 15 years of experience, Malcolm has a breadth of practical knowledge across a wide range of family-related matters. Malcolm has particular expertise in complex parenting matters, which often involve high-net worth clients and in turn, complicated financial issues. His experience in drafting Binding Financial Agreements, Child Support Agreements and Consent orders, as well as dealing with criminal and AVO matters, enables him to resolve complicated cases with a high level of aptitude and efficiency. As a Nationally Accredited Family Law Mediator and Arbitrator, Malcolm works at all times to resolve disputes without the need for court. In the event that litigation is unavoidable, Malcolm is highly experienced in advocating for clients across all jurisdictions and is well respected by both the judiciary and other members of the legal profession. Malcolm was a Finalist in the 2017 and winner of the 2019 Partner of the Year Awards (Family Law) as well as the Australian Law Awards – Partner of the Year and is the current Vice President of the Greater West Family Law Practitioners Association Inc.

Karina Ralston

Principal Lawyer, Team Leader Family Law, Coleman Greig – Parramatta

Karina Ralston is a Principal Lawyer and is the head of Coleman Greig's Penrith Family Law team. She is both an Accredited Specialist in Family Law and Accredited Family Law Mediator and Arbitrator, with experience and skills allowing her to provide advice and

representation in a range of matters including divorce, parenting arrangements, relocation cases, property matters, Binding Financial Agreements and De-Facto Relationships. Through her experience in academia, Karina has a comprehensive knowledge of current developments in legislative reform and case law. Karina has completed the Master of Laws (Applied Law) majoring in Family Law from the College of Law and is a casual academic at Western Sydney University teaching and marking various undergraduate law subjects, including family law. Karina's involvement with the South West Legal Service and prior work with the Women's Legal Centre includes providing pro-bono legal advice and assistance to those who may be experiencing legal difficulties. In addition, she mentors' students, cadets and graduates within Coleman Greig and the wider community. Karina has also joined the board of the Parramatta Law Society.

REFERENCES

Legislation

Succession Act 2009 (NSW)

Family Law Act 1975 (Cth)

Cases

Stanford v Stanford [2012] HCA 52

Kennon v Spry; Spry v Kennon (2008) HCA 56.